

opposing parties agree that particular materials should be protected from disclosure, the Commission must sometimes confront the difficulty of resolving a dispute in which significant portions of a lengthy and complicated record are subject to a protective agreement and a request for confidential treatment under Section 0.459.

50. We ask commenters to consider the most effective means of balancing our sometimes conflicting obligations to ensure protection of proprietary business data, to prevent undue delay in resolving formal complaints, and to produce decisions that adequately explain, by reference to a specific record, the basis for our disposition of a complaint. For instance, in some cases, a factually and legally sound decision cannot be drafted without referring to information subject to a claim of confidentiality. The particular information deemed by the staff as necessary for resolution may be only a small portion of voluminous materials that are subject to a protective order and provided to the Commission in confidence. Thus, considerable time might be necessary for the staff to examine all materials subject to claims of confidentiality and rule on those claims. If the staff were to rule on the confidentiality of only the particular information determined to be decisionally significant, however, this ruling might prematurely indicate to the parties the staff's recommendation for Commission or Bureau disposition of the complaint. In either instance, the complaint process could be delayed by administrative and judicial appeals of a confidentiality ruling. We ask commenters to consider whether any such delays and burden on Commission resources could or should be mitigated by issuing parts of adjudicatory decisions that rely on confidential information under seal. We seek comment on whether such a procedure would serve the public interest, given that complaint cases -- although adjudications of disputes between particular parties -- may result in rulings that indirectly, through the establishment of precedent, determine the legality of the practices of non-parties. We welcome suggestions as to how we can preserve the broad utility of the formal complaint process to elucidate the Commission's judgments regarding carrier conduct without either compromising sensitive business data or miring complaint proceedings in protracted peripheral disputes involving confidentiality.

## 6. Audits

51. The Commission has a statutory right of access to all accounts, records and memoranda, including all documents, papers, and correspondence kept or required to be kept by common carriers.<sup>107</sup> The detailed financial and commercial information inspected during an audit is generally sensitive in nature and is not customarily released to the public. This fact is highlighted by section 220(f) of the Communications Act,<sup>108</sup> which expressly prohibits

---

<sup>107</sup> 47 U.S.C. § 220(c).

<sup>108</sup> 47 U.S.C. § 220(f).

the release of information gathered during an audit absent a Commission or court order.<sup>109</sup> The Commission has held that the public disclosure of data gathered in an audit is likely to impair its future ability to obtain such data because while the Commission could rely on compulsory measures to obtain the desired materials, such measures would involve significant expense and delay.<sup>110</sup> The Commission has also recognized in this regard that although the information gathering process that takes place during an audit begins with a general inquiry that presents an opportunity for a very selective response by the carrier, carriers have been very cooperative, not only permitting examination of company records, but also allowing employee interviews and preparing new documents.<sup>111</sup> The Commission has also recognized that if audit materials were routinely disclosed, it would be likely that voluntary assistance in providing information would diminish, especially since the audits do not present the expectation of a government-bestowed benefit on the carrier.<sup>112</sup>

52. The Commission has departed from its general policy and publicly released audit reports only in extraordinary circumstances when (i) the summary nature of the data contained in a particular report is not likely to cause the providing carrier substantial competitive injury, (ii) the release of the summary data and information is not likely to impair our ability to obtain information in future audits and (iii) overriding public interest

---

<sup>109</sup> Section 220(f) does not, however, constitute authority to withhold information that is required to be disclosed under the FOIA, since Section 220(f) does not satisfy the requirements of Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3). Exemption 3 provides that material need not be released where it is "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." The Commission has also made clear that the Bureaus and Offices who may be custodians of such audit records have the authority to disclose such information where the information is required to be disclosed under the provisions of the FOIA. *Amendment of Part 0 of the Commission's Rules with Respect to Delegation of Authority to Chief, Common Carrier Bureau*, 104 FCC 2d 733, 737 (1986).

<sup>110</sup> *J. David Stoner*, 5 FCC Rcd 6458, 6459 (1990); *Martha H. Platt*, 5 FCC Rcd 5742, 5743 (1990); *Scott J Rafferty*, 5 FCC Rcd 4138, 4138 (1990); *Western Union Telegraph Co.*, 2 FCC Rcd 4485, 4486 (1987). In addition, the Commission has recognized that Commission-generated audit reports are intra-agency memoranda that are exempt from disclosure under Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5). *J. David Stoner*, 5 FCC Rcd at 6460.

<sup>111</sup> *J. David Stoner*, 5 FCC Rcd at 6459.

<sup>112</sup> *Id.*

concerns favor release of the report.<sup>113</sup> In the past, we have normally allowed submitters to request confidentiality for such data and have dealt with such requests on a case-by-case basis, consistent with the applicable standards in FOIA.<sup>114</sup> We seek comment on whether we should continue to follow this policy and on whether and in what circumstances information gathered during an audit should be released even under a protective order.

## 7. Surveys and Studies.

53. The Commission has authority to conduct studies and surveys needed to fulfill its regulatory functions. The precise authority for such studies may come directly from Congress<sup>115</sup> or pursuant to the Commission's authority to inquire into matters within its jurisdiction.<sup>116</sup> Unlike information submitted in support of a specific regulatory action involving the submitting entity, surveys may request information from a broad category of regulated entities who are only submitting data because they were selected as part of a survey sample. Because these studies may involve the submission of information deemed competitively sensitive by responding entities, we seek comment on standards that should be applied to protect the confidentiality of information submitted in this context. We also seek comment regarding the treatment of such information when the information is used ultimately in the development of Commission rules or policies.

### D. Scope of Materials Not Routinely Available for Public Inspection

54. The need for and burdens associated with protective orders are necessarily affected by the amount of information eligible for protected status. Accordingly, we seek comment on several issues raised by our current rules on materials not routinely available for public release.

55. Categories of Materials that are not Routinely Available for Public Inspection. Section 0.457(d) of our rules contains a list of categories of materials that are not routinely available for public inspection and as such do not require a request for such treatment under Section 0.459. To the extent it is possible to define broad categories of information that should not be routinely available for public inspection, we can reduce administrative burdens

---

<sup>113</sup> *Bell Telephone Operating Companies*, FCC 94-418 (released Oct. 17, 1995); *see also*, e.g., *Bell Communications Research, Inc.*, 7 FCC Rcd 891 (1992); *BellSouth Corp.*, 8 FCC Rcd 8129, 8130 (1990).

<sup>114</sup> E.g., *Bell Communications Research, Inc.*, 7 FCC Rcd 891 (1992); *BellSouth Corp.*, 8 FCC Rcd 8129, 8130 (1990).

<sup>115</sup> *See*, e.g., 47 U.S.C. § 543(k) (requiring survey of prices between competitive and noncompetitive cable television systems).

<sup>116</sup> *See*, e.g., 47 U.S.C. § 403.

on the Commission and submitters. On the other hand, over-inclusive categories would not be consistent with the presumption FOIA creates in favor of disclosure. We seek comment whether the current list of materials that are not routinely available for public inspection is appropriate or whether the list ought to be expanded or contracted.

56. Substantiating Confidentiality Claims. Section 0.461(a) of the Commission's confidentiality regulations provides that a person submitting information or materials to the Commission may request that the information not be made routinely available to the public. Section 0.461(b) requires that each such request contain a statement of the reasons for withholding the materials from inspection and of the facts upon which those reasons are based. Because the Commission sometimes receives frivolous or unsubstantiated requests for confidentiality, we seek comment on whether the Commission should establish a policy or rule specifying more explicitly types of information that should be provided to comply with Section 0.461(b).

57. Information that the submitter could be required to provide to substantiate requests for confidentiality might include:

- (1) What portion of the information the submitter believes is entitled to confidential treatment;
- (2) The length of time for which confidential treatment is desired;
- (3) Measures taken by the business to prevent undesired disclosure to others;
- (4) The extent to which the information has already been disclosed to others;
- (5) Specific information showing the degree to which the information concerns a service that is subject to competition; and
- (6) Specific information concerning why disclosure would result in substantial harmful effects to the business' competitive position.

58. Establishing a policy specifying what types of information should be provided to comply with Section 0.461(b) might be beneficial for several reasons. First, it would enable the Commission to deal in a more efficient fashion with requests that materials not be made routinely available to the public and with requests to release materials not made routinely available to the public. For example, even though our rules provide for seeking confidential treatment for only portions of documents when other portions of documents are nonconfidential,<sup>117</sup> submitters frequently assert an entire submission as confidential, even though many documents are not composed entirely of confidential business information.

---

<sup>117</sup> 47 C.F.R. § 0.459(a).

When the Commission is dealing with masses of data from multiple submitters, uncertainty as to what specific confidentiality claims are being asserted can be a significant barrier to efficient action. In addition, a policy specifying what types of information should be provided to comply with Section 0.461(b) might help reduce those confidentiality claims made as a matter of course and induce submitters to be more selective in their confidentiality claims. We seek comment on these benefits and on whether more precise substantiation requirements might burden a submitter's assertion of a claim for information which is truly entitled to confidential treatment. We also seek comment on what measures might be appropriate to deter frivolous requests for confidential treatment.

59. Aggregated or Sanitized Information. The Commission sometimes finds it beneficial to disclose to the public non-confidential information derived from data supplied by businesses and claimed as confidential. Such releases might take the form of industry-wide data aggregated into a non-confidential figure, or sanitized documents where all information that could identify the submitters has been removed. We seek comment on procedures the Commission could use to ensure that the portions of the sanitized or aggregated documents which are disclosed do not contain information claimed as confidential and whether the rules should be amended to incorporate such procedures.

E. Proposed Clarifications to Commission Rules

60. Any person submitting information or materials to the Commission that do not fall within the specific categories of information not subject to routine disclosure<sup>118</sup> may also request, on an *ad hoc* basis, that such information not be made routinely available for public inspection under Exemption 4.<sup>119</sup> The Commission is considering amending Section 0.459 of its rules to make express in the rules an existing practice whereby the Commission sometimes defers acting on a request for confidentiality if no request for inspection has been made. This practice conserves Commission resources because Exemption 4 determinations are often complex and require substantial Commission analysis. In such instances, the party submitting the information for which confidentiality is claimed is not harmed because the information is not available for public inspection pending Commission action on the confidentiality request. Likewise, the public is not harmed, because, under the FOIA, the Commission would be required to rule on any request that the information be disclosed. We seek comment on codifying this practice of deferring action on requests for confidentiality in the absence of a FOIA or other request for the information.

61. The Commission also proposes a clarifying amendment to the title of Section 0.457(d) of its rules to better describe the Section's contents. The amended title would read: "Certain trade secrets and commercial or financial information obtained from any person and

---

<sup>118</sup> See 47 C.F.R. § 0.457(d).

<sup>119</sup> 47 C.F.R. § 0.459(a).

privileged or confidential--categories of materials not routinely available for public inspection."

#### **IV. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS**

62. Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

63. Reason for action. The Communications Act of 1934 and the Commission's rules require the Commission to balance various factors in determining whether and under what conditions to withhold or to disclose competitively sensitive information that has been submitted to the Commission and that is not required to be publicly disclosed under the Freedom of Information Act. This Notice proposes to examine the Commission's regulations and policies to determine whether the Commission should modify its existing disclosure policies and rules.

64. Objectives. To implement the Communications Act of 1934 and the Freedom of Information Act and to develop a policy that will guide the Commission in evaluating the increasing number of requests that it afford confidential treatment to information that has been provided to it by regulated entities and others.

65. Legal Basis. Action as proposed for this rulemaking is contained in Sections 4(i), 4(j), 303(r) and 403 of the Communications Act of 1934, as amended.

66. Description, potential impact and number of small entities affected. The Commission's policies and rules regarding the disclosure of confidential commercial and financial information affects small entities that are regulated by the Commission and small entities that participate in Commission proceedings.

67. Reporting, record keeping and other compliance requirements. None.

68. Federal rules which overlap, duplicate or conflict with this rule. None.

69. Any significant alternatives minimizing impact on small entities and consistent with stated objectives. None.

## **V. PAPERWORK REDUCTION ACT**

70. The requirements proposed herein have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose no new or modified information collection requirement on the public.

## **VI. PROCEDURAL PROVISIONS**

71. This Notice of Inquiry and Notice of Proposed Rulemaking is issued pursuant to authority contained in Sections 4(i), 4(j), 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), 154(j), 303(r) and 403. Pursuant to applicable procedures set forth in Sections 1.415, 1.419 and 1.430 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419 and 1.430, interested parties may file comments on or before 60 days following publication in Federal Register and reply comments on or before 90 days following publication in *Federal Register*. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

72. Ex parte Rules - Non-Restricted Proceeding. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

73. Further information on this proceeding may be obtained by contacting Joel Kaufman in the Office of General Counsel at (202) 418-1720.

## **VII. ORDERING CLAUSES**

74. IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154 (i), 154 (j), 303(r) and 403, NOTICE IS HEREBY GIVEN of proposed amendments to Part 0, in accordance with the proposals and discussions, in this Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

1.

75. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Cafon  
Acting Secretary



## APPENDIX A: MODEL PROTECTIVE ORDER AND DECLARATION

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

[Name of Proceeding]        )    Docket No. \_\_

### PROTECTIVE ORDER

This Protective Order is a device to facilitate and expedite the review of documents containing trade secrets and commercial or financial information obtained from a person and privileged or confidential. It reflects the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or otherwise.

1. For purposes of this Order, "Confidential Information" shall in the first instance mean either (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) or (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of [cite Commission order designating items for treatment as Confidential Information]. Confidential Information shall be deemed to include additional copies of and information derived from Confidential Information.

2. The Commission may *sua sponte* or upon petition determine that all or part of the information claimed as "Confidential Information" is not entitled to such treatment.

3. Confidential Information submitted to the Commission shall bear on the front page in bold print, "CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE." Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the

submitting party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

4. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. In the event that any person requests that Confidential Information be released publicly, the Commission will treat the request pursuant to 47 C.F.R. § 0.461.

5. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties or if a Reviewing Party has no counsel to a person designated by the Reviewing Party. Reviewing Party shall mean a party to a Commission proceeding or any person or entity filing a pleading in a Commission proceeding. Before counsel to a Reviewing Party or such other designated person may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration.

6. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 7 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, Authorized Representatives must execute the attached Declaration.

7. Authorized Representatives shall be limited to:

- a. Counsel for the Reviewing Parties to this proceeding including in-house counsel actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding, provided that such persons are not representing or advising or otherwise assisting . . . ;
- b. Specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding except that disclosure to persons in a position to use this information for competitive commercial or business purposes shall require the approval of the Commission; or
- c. Any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.

8. Confidential Information shall be maintained by a Submitting Party for inspection at least the two locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives by appointment during normal business hours. The Submitting Party shall provide copies of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page.

9. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding, and provided further that the original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times and shall not pass to any other persons except as provided herein.

10. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission with a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline prescribed by the Commission.

11. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

12. Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

- a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings;
- b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;
- c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked:  
"Confidential Information included pursuant to Protective Order, [cite proceeding];" and
- d. The confidential portion(s) of the pleading shall be served upon the Secretary of the Commission, the Submitting Party, and those

Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. Reviewing Parties may provide courtesy copies of pleadings containing Confidential Information to Commission staff.

13. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to denial of further access to Confidential Information in this proceeding.

14. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall destroy all Confidential Information as well as all copies and derivative materials made, and shall certify that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party.

15. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of privileged information shall not be deemed a waiver of the privilege.

16. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information. Moreover, it in no way precludes the Commission from disclosing any Confidential Information where it determines the public interest so requires.

17. This Protective Order is issued pursuant to Section 4(i) of the Communications Act as amended, 47 U.S.C. § 154(i) and 47 C.F.R. § 0.457(d).

18. As used in this Order, the term "Commission" shall also include any arm of the Commission acting pursuant to delegated authority.

**DECLARATION**  
**[Cite Proceeding]**

I, \_\_\_\_\_, hereby declare under penalty of perjury that I have read the foregoing Protective Order that has been entered by the Commission in this proceeding, and that I agree that I will be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

(signed) \_\_\_\_\_  
(printed name) \_\_\_\_\_  
(title) \_\_\_\_\_  
(affiliation) \_\_\_\_\_  
(address) \_\_\_\_\_  
\_\_\_\_\_  
(phone) \_\_\_\_\_  
(date) \_\_\_\_\_